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IN THE
SUPREME COURT OF FLORIDA

CASE NO.: 85,558

UNION PARK MEMORIAL CHAPEL, POWELL-
WEBBER FUNERAL SERVICES, INC., f/k/a
BURKETT-WEBBER FUNERAL SERVICES, INC.,

Petitioners,

v.

KATHLEEN BARRINGTON HUTT, f/k/a
KATHLEEN G. BARRINGTON and
BRIAN HUTT, her husband,

Respondents.

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Throughout this Brief on the Merits of Respondents, KATHLEEN BARRINGTON HUTT, f/k/a KATHLEEN G. BARRINGTON and BRIAN HUTT, her husband, the Respondents shall be referred to as "Respondents," or "Plaintiffs." Petitioner shall be referred to as "Union Park" or "Petitioner."

Further, citations to the record on appeal shall be designated (R). Citations to the transcript of the proceedings of April 21, 1994 shall be designated (TR).

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STATEMENT OF THE CASE AND FACTS

On or about August 26, 1993, Plaintiffs filed this action for personal injuries arising from a motor vehicle accident that occurred on February 26, 1992. (R 1-7). By stipulation of the parties, the original Complaint was amended and served on or about November 22, 1993. (R 68-69, 70-79, 95-105). In response, Union Park served its Motion to Dismiss Amended Complaint on or about December 13, 1993. (R 121-122). A hearing was held on April 21, 1994 regarding Union Park's Motion to Dismiss Amended Complaint. (TR 1-15).

In the meantime, Respondents settled their claim against the insured/underinsured driver and their own underinsured motorist carrier. Those parties were dismissed on or about March 4, 1994 and March 14, 1994. (R 145-148). After the hearing on Union Park's Motion to dismiss Amended Complaint, the trial court dismissed Respondents' Amended Complaint with Prejudice on the grounds that same failed to state a cause of action under Florida Law. (R 160-169).

The Amended Complaint alleged that Plaintiff was injured in a motor vehicle accident on or about February 26, 1992 while she was operating a motor vehicle in a funeral procession that was being supervised in connection with a funeral presided over and handled by Union Park. The Amended Complaint further alleged that Union Park had a duty or assumed a duty to operate and supervise the funeral procession with due regard for the safety of Respondent, a member of the funeral procession. (R 97-105).

The pertinent allegations of the Amended Complaint against Union Park were as follows:

"24. While the funeral procession was leaving the premises operated by UNION PARK MEMORIAL, an employee of UNION PARK MEMORIAL was standing and directing the vehicles onto the roadway.

25. During years past, UNION PARK MEMORIAL has retained the gratuitous services of the Orange County Sheriff's Department at no charge to direct traffic and/or provide escort services from the funeral home through minor and major intersections to the cemetery.

26. At the time of the accident described herein, the Orange County Sheriff's Department had ceased offering traffic direction or escort services to UNION PARK MEMORIAL as a policy decision made by a new administration and new sheriff.

27. The subject accident occurred at a major intersection heavily travelled by motor vehicles in all directions on Dean Road and on State Road 50.

28. UNION PARK MEMORIAL had in the past utilized the services of the Orange County Sheriff's Department to direct and control traffic at said intersection during funeral processions for the safety of all motorists.

29. Defendant, UNION PARK MEMORIAL, was negligent in one or more of the following ways:

- A. Defendant, UNION PARK MEMORIAL, failed to properly supervise the funeral procession;
- B. Defendant, UNION PARK MEMORIAL, failed to provide an escort service and/or traffic director at the major intersection where the accident occurred so as to decrease the likelihood of such an accident and to prevent such an accident from occurring;
- C. Defendant, UNION PARK MEMORIAL, failed to advise all funeral participants, including Plaintiff, of the potential risk in traffic, failed to advise of their escort practices, failed to advise of their traffic direction practices, and failed to provide warnings on major intersections that the funeral procession would be travelling through, as well as failing to provide instructions for the funeral procession and directions to the destination of the funeral procession;

- D. Defendant, UNION PARK MEMORIAL, failed to provide adequate information, instructions, warnings, and protection for the funeral participants by failing to provide them with escort services and/or instructions for traffic procession, leaving the participants unprotected and alone to find their way to the cemetery/destination and encouraging funeral participants to "keep up" with the remainder of the funeral procession regardless of traffic control devices in route to the destination and despite the lack of traffic directing at major intersections;
- E. Defendant, UNION PARK MEMORIAL, failed to provide any type of recommendations, instructions, or warnings for travel in traffic flow to or from the cemetery/destination of said funeral procession.
- F. Off-duty law enforcement officers were available for hire to provide escort or traffic direction services for said funeral processions, but UNION PARK MEMORIAL did not retain said services on the date of the accident;
- G. The Florida Highway Patrol was available for hire to provide escort of traffic direction services for said funeral procession and does provide traffic direction for churches in the Orlando area on major heavily travelled roadways at the request of churches, but UNION PARK MEMORIAL did not retain or attempt to retain their services;
- H. Private escort services were available for hire by UNION PARK MEMORIAL at the time of the accident but were not retained by UNION PARK MEMORIAL.

30. Defendant, UNION PARK MEMORIAL, was negligent in the foregoing manner despite its knowledge that the funeral was being attended by guests unfamiliar with the geographical area where the accident occurred and despite its familiarity with the area and knowledge that the intersection was heavily travelled and its knowledge that all vehicles in the

funeral procession could not pass through the intersection during one cycle of the green light for traffic on State Road 50.

The parties also stipulated that Respondent had a red traffic light at the time of the collision, along with the rest of the funeral procession and had her headlights on. (TR 1-15). The trial court entered its Final Order of Dismissal on or about May 6, 1994. (R 160-169). The Trial Court based its ruling on McCorvey v. Smith, 411 So.2d 273 (Fla. 1st DCA 1982) which held that Section 316.1974, Florida Statutes did not impose a duty upon a funeral director in a lead car, who merely undertook to get the procession started through the intersection, to see that all cars following him in the procession crossed the intersection safely. (R 160-169).¹

On appeal to the Fifth District Court of Appeal, the Fifth District Court of Appeal held that Respondents' Complaint stated a cause of action but acknowledged conflict with McCorvey v. Smith, 411 So.2d 273 (Fla. 1st DCA 1982).

¹ Section 316.1974, Florida Statutes states, in pertinent part, as follows:

"Pedestrians and the operators of all vehicles...shall yield the right of way to each vehicle which is a part of a funeral procession. Whenever the lead vehicle in a funeral procession lawfully enters an intersection, the remainder of the vehicles in such procession may continue to follow the lead vehicle through the intersection, notwithstanding any traffic control device or right of way provisions prescribed by statute or local ordinance, provided the operator of each vehicle exercises due care to avoid colliding with any other vehicle or pedestrian upon the roadway."

ISSUE ON APPEAL

WHETHER PLAINTIFFS' AMENDED COMPLAINT STATED A CAUSE OF ACTION AGAINST UNION PARK FOR NEGLIGENCE IN THE DIRECTION AND SUPERVISION OF THE FUNERAL PROCESSION IN WHICH PLAINTIFF WAS INJURED IN A MOTOR VEHICLE ACCIDENT.

SUMMARY OF ARGUMENT

To the extent that McCorvey is interpreted as holding that there is never a duty, under any set of circumstances or facts, on the part of a funeral director or funeral home to provide an escort service or traffic direction or instructions to members of the funeral procession so as to minimize the likelihood of motor vehicle accidents and injuries at busy or heavily traveled intersections, plaintiff submits that such a holding is improper.

Plaintiff does not dispute that Section 316.1974, Florida Statutes does not impose such a duty upon funeral directors. The holding in McCorvey appears to be limited to the issue of whether that statute imposed such a duty. Plaintiff does not rely upon the statute in alleging that Union Park had such a duty in this case.

Rather, the issue is whether Plaintiffs' Amended Complaint alleges action or inaction on the part of Union Park which created or broadened a foreseeable zone of risk such that a jury could determine that Union Park had a duty to either lessen the risk or see that sufficient precautions were taken to protect the participants in the funeral home from the harm that the risk posed. Plaintiffs submit that the allegations of the Amended Complaint were sufficient to state a cause of action and that a jury should have been permitted to determine whether Union Park's actions and inactions, as alleged in the Amended Complaint foreseeably created or broadened a zone of risk to Plaintiffs.

In substance, the Amended Complaint alleges that Union Park knew or should have known that there was a risk to participants in

the funeral procession when crossing the heavily traveled intersection at which the accident occurred and that despite that risk, Union Park failed to provide some escort or traffic direction at the major intersection, failed to warn the funeral participants of the risk associated with the procession through the major intersection, failed to provide instructions and directions to the cemetery, encouraged participants in the funeral procession to "keep up" with the rest of the funeral procession regardless of traffic control devices, and failed to use available escort or traffic direction services despite Union Park's knowledge that the funeral was being attended by guests unfamiliar with the geographical area where the accident occurred. Plaintiffs' submit that those allegations were sufficient to allege that Union Park owed a duty and/or assumed a duty to minimize the risks to the funeral procession participants of crossing the major intersection enroute to the cemetery. This liability is based, not on Section 316.1974, Florida Statutes, but upon Florida Common Law.

Accordingly, the Court erred in dismissing Plaintiffs' Amended Complaint with Prejudice and/or McCorvey, as interpreted by the Trial Court, was incorrectly decided and should not be followed by the Supreme Court of Florida.

ARGUMENT

PLAINTIFFS' AMENDED COMPLAINT DID STATE A CAUSE OF ACTION FOR NEGLIGENCE AGAINST UNION PARK.

The Trial Court's decision dismissing Plaintiffs' Amended Complaint with Prejudice was based upon McCorvey v. Smith, 411 So.2d 273 (Fla. 1st DCA 1982) which held that Section 316.1974, Florida Statutes did not impose a duty upon a funeral director in a lead car, who merely undertook to get a funeral procession started through an intersection, to see that all cars following him in the procession crossed the intersection safely. Section 316.1974, Florida Statutes states, in pertinent part, as follows:

"(2) Pedestrians and the operators of all vehicles, except emergency vehicles, shall yield the right of way to each vehicle which is a part of a funeral procession. Whenever the lead vehicle in a funeral procession lawfully enters an intersection, the remainder of the vehicles in such procession may continue to follow the lead vehicle through the intersection notwithstanding any traffic control device or right of way provisions prescribed by statute or local ordinance, provided the operator of each vehicle exercises due care to avoid colliding with any other vehicle or pedestrian upon the roadway.

(3) No person shall operate any vehicle as a part of a funeral procession without having the headlights of such vehicle lighted."

Plaintiffs certainly do not dispute that the above statute, by its own language, does not purport to impose any duty upon a funeral director. Rather, said statute imposes duties upon motorists on Florida highways. Plaintiff did not rely in her Amended Complaint and does not rely now upon that statute in contending that Union Park had duties to her that were breached.

As indicated by the Fifth District Court of Appeal, the

statute does not address the existence of vel non of a funeral director's duty to use care in planning and leading a funeral procession in a manner that minimizes reasonably anticipated risks to procession participants. Such a duty might include, for example, planning a safer route to the cemetery or providing an escort or crossing guard. The statute does not relieve funeral directors of such duty, nor has the Florida legislature relieved funeral directors of any duty of care in planning or providing procession services.

As alleged in the Amended Complaint and as stipulated by the parties, Plaintiff operated her motor vehicle in the funeral procession with her headlights on as required by statute. (TR 1-15) (R 97-105). Plaintiff also was a part of the funeral procession when proceeding through a red light at a major intersection enroute to the cemetery. (R 97-105). Despite Florida's traffic laws, Plaintiffs submit that a funeral procession being lead through a major intersection without any escort or traffic direction creates or broadens the risk of injury to participants in the funeral procession by motorists who assume that they are lawfully operating their vehicles through the intersection and do not recognize that a funeral procession is passing. The question for this Honorable Court is whether the Plaintiff has alleged sufficient facts in her Amended Complaint to present a jury question as to whether Union Park was under a duty to provide traffic direction, escort, or at least instructions or warnings to funeral procession participants to minimize the risk of collision and injury.

The prime foundation of liability in negligence cases is knowledge - or what is deemed to be in law the same thing, opportunity by the exercise of reasonable diligence to acquire knowledge of the peril which subsequently results in injury. Fault on the part of the Defendant is to be found in his action or non-action accompanied by knowledge, actual or implied, of the probable results of his conduct contemporaneous with the infliction of injury. Springer v. Morris, 74 So.2d 781 (Fla. 1954). Plaintiffs do not dispute that Section 316.1974, Florida Statutes does not extend any duty to the funeral director. However, Plaintiffs do dispute that McCorvey should be interpreted as holding that a funeral director can have no duty under any set of circumstances or facts to take action to minimize the risks of automobile collisions involving funeral processions, particularly where the funeral procession is expected to cross a heavily traveled major intersection where it is likely that other motorists may fail to observe that a funeral procession is in progress. This, of course, would be quite different from a funeral procession traveling through minor or rural intersections where a funeral procession would be readily observed by passing motorists.

The responsibility of Florida motorists should not relieve Union Park of its potential liability and duty of care. Florida Court's have certainly imposed duties upon non-motorists for increasing the risk of hazards to motorists. For example, the Fourth District Court of Appeal has held that a jury question was presented on the issue of whether an outdoor motion picture theater

was under a duty to either improve approaches to the theater or hire personnel to regulate traffic, so as to avoid the possibility of an accident occurring due to traffic congestion prior to the beginning of a show. See Thunderbird Drive-In Theater, Inc. v. Reed, 571 So.2d 1341 (Fla. 4th DCA 1990). In that case, the accident occurred on Sunrise Boulevard in Fort Lauderdale, Florida near the entrance to the Thunderbird Drive-In Theater. At the time of the accident, Reed was operating his motorcycle westbound on Sunrise Boulevard. He had stopped at a traffic light approximately 1/10th of a mile east of the entrance to the theater and proceeded toward the entrance to the theater, which was located on the north side of Sunrise Boulevard. At the same time, Christopher Coyman, driving a pickup truck, was proceeding east on Sunrise Boulevard and attempted to make a left hand turn across the west bound lanes of Sunrise Boulevard into the theater but was unable to make it completely across Sunrise before Reed ran into the side of Coyman's truck. There was evidence that the northern most lane of the west bound traffic had cars lined up waiting to turn into the theater, as did the left turn lane of the east bound traffic. Coyman saw an opening in the theater entrance and pulled around the lead car in the left turn lane and attempted to cross Sunrise Boulevard, but was unable to do so because another car moved into the theater entrance. This left Coyman in the path of Reed's motorcycle resulting in the collision. Visibility was never an issue. There was nothing obstructing the view of either of the parties to the collision. Id.

The Fourth District Court of Appeals cited Kaisner v. Colb, 543 So.2d 732 (Fla. 1989) wherein the Court stated:

"There is a strong public policy in this State that, where reasonable men may differ, the question of foreseeability in negligence cases should be resolved by a jury. Vining v. Avis Rent-a-Car Systems, Inc. 354 So.2d 54, 56 (Fla. 1977). Where a Defendant's conduct creates a foreseeable zone of risk, the law generally will recognize the duty placed upon the defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses."

The Fourth District Court of Appeal held that a jury question was presented on the issue of whether the Thunderbird Drive-In Theater, Inc. was under a duty to either improve approaches to the theater or hire personnel to regulate traffic to avoid the possibility of accidents occurring due to traffic congestion. Id. In much the same manner, Plaintiffs contend in the instant case that a funeral procession being led through a major and heavily traveled intersection creates a foreseeable zone of risk of accidents and injuries. A jury should be permitted to determine whether, under such circumstances a funeral home or funeral director is under a duty to take action to minimize the risk to funeral procession participants when resources are available for the funeral home or funeral director to do so.

Likewise, in Johnson v. Howard Mark Productions, Inc., 608 So.2d 937 (Fla. 2nd DCA 1992), the Second District Court of Appeal reversed a summary judgment entered against an injured Plaintiff where the Complaint alleged that the Plaintiff had been struck and killed by an automobile while attempting to cross U.S. Highway 41 in Bradenton, Florida to patronize the Defendant's teenage

nightclub by reason of "woefully insufficient" parking that required teenagers to walk across the highway in the dark to reach the club. The Second District Court of Appeal also cited Kaisner v. Colb, 543 So.2d 732, 735 (Fla. 1989).

In the instant case, the Plaintiffs' Complaint alleges that Union Park was aware that funeral procession participants were unfamiliar with the geographical area and yet provided no traffic direction or escort through the heavily traveled major intersection where the accident occurred, despite the availability of on or off duty law enforcement officers or private escort, and even failed to provide any warnings and instructions regarding the route to the cemetery so that participants could find their way to the cemetery in the event of separation from the lead vehicles. (R 97-105). Courts in other states have held that funeral homes may be determined to have duties under such circumstances. In Maida v. Velella, 511 N.E.2d 56 (C.A. NY 1987) the Court of Appeals of New York held that it was for the jury to determine whether a funeral home, which had undertaken to lead a funeral procession, breached a duty owed to mourners by stopping the procession before all automobiles had crossed a busy public road which bisected the cemetery and whether any such breach was the proximate cause of the accident which occurred when an automobile in the procession was struck by another automobile in the street. In addition, the Court of Appeal of Louisiana, Fourth Circuit held that a factual question precluded Summary Judgment as to whether a funeral director had a duty to those who participated in a funeral procession arranged by

him to prevent risks of collision at intersections between the unescorted procession and other motorists. See Pickett v. Jacob Schoen & Son, Inc., 488 So.2d 1257 (La. App. 4 Cir. 1986). In that case, the Court stated as follows:

"Based on the record before us we cannot say as a matter of law that a funeral director has no duty to those who participate in a funeral procession arranged by him to prevent the risks encompassed by the facts of this case. The affidavits of Officer Becnel and Mr. Berniard, at the very least, raise issues of material fact in this Court's mind as to what risks a "reasonable man" funeral director in the New Orleans area should foresee in conducting a funeral procession, and what measures he may or should take to prevent them."

In Pickett, Mr. Pickett was traveling through an intersection on a light that turned red after he entered the intersection when the collision occurred and was part of a funeral procession that had been traveling behind the hearse with their lights on. Id.

In the instant case, a jury should be permitted to determine if the alleged acts and omissions of Union Park created or broadened a reasonably foreseeable zone of risk of injury to Plaintiff. As in Pickett, a jury should be permitted to determine what risks a "reasonable man" funeral director in the Orlando area should foresee in conducting a funeral procession and what measures he may or should take to prevent them. Plaintiff innocently followed the funeral procession as expected and obeyed applicable Florida traffic laws. She should be permitted her day in Court, and Plaintiffs respectfully submit that a jury could find that a duty existed under the allegations of the Amended Complaint.

As aptly stated in the Opinion of the Fifth District Court of Appeal, the Complaint alleged facts stating that the funeral


director was sufficiently acquainted with the intersection and the length of the funeral procession to have fore-knowledge that not all of the cars would clear the intersection with a green light. Knowing that local law enforcement was no longer providing escort services for their processions, the funeral director nonetheless made no effort to provide similar services or to warn the participants of the dangers even at this dangerous intersection.

Accordingly, the decision of the Fifth District Court of Appeal should be affirmed and this case remanded to the Trial Court for further proceedings.

CONCLUSION

For the foregoing reasons, the Fifth District Court of Appeal properly decided that the trial court erred in dismissing Respondents' Amended Complaint with prejudice and the Fifth District Court of Appeal properly reversed the Trial Court's judgment and remanded this case for trial. Accordingly, Respondents respectfully request that this Honorable Court affirm the decision of the Fifth District Court of Appeal and remand this action for further proceedings.

Respectfully submitted this 2nd day of June, 1995.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June, 1995 a copy of the foregoing was mailed to: George A. Meier, III, Esq., Post Office Box 4973, Orlando, FL 32802; Richard A. Ramsey, Esq., Post Office Box 2753, Orlando, FL 32802; Marybeth McDonald, 20 N. Orange Avenue, Suite 900, Orlando, FL 32802; Robert D. Melton, Esq., P. O. Drawer 1032, Orlando, FL 32802; and Douglas L. Stowell, Esq., P.O. Box 11059, Tallahassee, FL 32302.



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